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HAROLD B. WILLEY, Cle

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 518

HELEN M. KIEFER, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

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To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Helen M. Kiefer, appellee below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on August 18, 1955 (A 34).

OPINIONS BELOW

District Court Judge Holtzoff rendered an opinion sustaining the motion of the petitioner for a judgment against the United States on the contract of government insurance sued upon and this opinion is set forth on pages 13 and 14 of the record. The opinion of the United States

Court of Appeals for the District of Columbia Circuit reversing the judgment of the District Court is set forth in this petition at page A 27. It has not yet been printed in the Federal Reporter.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on August 18, 1955 (A 34). This petition for certiorari is filed within ninety days thereafter pursuant to the provisions of Title 28 U.S.C. Section 2101 (c).

QUESTIONS INVOLVED ON APPEAL

1. Whether George N. Herbert committed fraud in applying for and obtaining reeinstatement of his lapsed National Service Life Insurance contract on April 26, 1948.

2. Whether a veteran suffering from service incurred disabilities requests reinstatement of his insurance policy and stated that he had applied for disability compensation and gave his correct claim number in the Veterans Administration can the United States which approved the application for reinstatement claim that it had no notice of the medical reports contained in the Veterans Administration which said administration approved the application for reinstatement, the sole basis of the alleged fraud being predicated upon the medical examinations made by the medical staff of the Veterans Administration all of which were contained in his folder and to which was referred to in the application for reeinstatement.

STATEMENT OF THE FACTS

This is a suit brought by the petitioner, Helen M. Kiefer, upon the National Service Life Insurance policy of one George N. Herbert who was her brother. Jurisdiction of the court below is vested under Title 38 USC 817. The sole question involved in the case is whether the insured committed fraud in the reinstatement of his $5000.00 National Service Life Insurance policy which was reinstated upon his application on April 26, 1948. The application for reeinstatement of the policy is set forth on page 17 of the record. Three questions are involved in determining the issue.

8. Are you now in as good health as you were on the due date of the first premium in default?
   ☒ Yes.

9. Have you been ill, or suffered or contracted any disease, injury, or infirmity, or been prevented by reason thereof from attending your usual occupation, or consulted a physician, surgeon, or other practitioner for medical advice or treatment at home, hospital, or elsewhere, in regard to your health, since lapse of this insurance?
   ☒ No. (If "yes", give all dates and full particulars below)

10. Have you ever applied for disability compensation, retirement pay, pension or waiver of insurance premiums?
    ☒ Yes. (If "yes", give Claim No. below)

    C-No.
    5 241 066

The insurance was reinstated upon the application which contained the foregoing (3) questions, and premiums were paid until the date of death. Following the death of the insured, application was made by the petitioner for payment of the insurance, and then for the first time it was

determined by the Veterans Administration that the insured had practised fraud in obtaining reinstatement of his policy. No refund of premiums were ever made to the insured or to his estate nor has there been any tender of premiums.

At the time that the insured made the application on April 26, 1948, he was receiving compensation for his war disabilities and had been rated 60%. Since he was less than totally disabled from his war disabilities, he was entitled to have his insurance reinstated. The Veterans Administration predicated the fraud upon the ground that the insured was receiving compensation and that he had been examined a number of times by the medical staff of the Veterans Administration. There was no contention that George N. Herbert had been examined by any private physicians of which the Veterans Administration had no notice, but it is conceded that all of the medical examinations which is the basis of the alleged fraud were contained in the files of the Veterans Administration, the contention being that the fraud is in representing that he was in as good health as he was on the due date of the premium in default and his "no" answer to question #9 set forth above. The government contended that the fact that the insured had stated that he applied for compensation and given his claim number did not put them on notice as to the medical reports contained in the file of the Veterans Administration the very administration which reinstated his insurance.

The petitioner made a motion for summary judgment which was granted by District Judge Holtzoff (R. 15), and Judge Holtzoff rendered an opinion at the same time which is shown on pages 13 & 14 of the record. The United States Court of Appeals for the District of Columbia upon appeal by the United States reversed the judgment of the District Court. This petition is to review that decision.

SPECIFICATION OF ERRORS TO BE URGED

The petitioner will urge that the decision of the U. S. Court of Appeals for the District of Columbia in this cause is contrary to the weight of authority and conflicts with decisions of other Courts of Appeal of the United States. That the Veterans Administration had actual or constructive notice of the medical reports contained in their own file at the time the application for reinstatement was granted. It is these medical reports of which they had knowledge which is the basis of their charge of alleged fraud. That the insured correctly answered the questions relating to these medical reports by making reference to the fact that he had applied for compensation and giving his correct claim number in the Veterans Administration. The petitioner will further argue that the Veterans Administration, having full and complete knowledge as to all disabilities of the insured, cannot charge that fraud was perpetrated in the reinstatement of the policy in question.

REASONS FOR GRANTING THE WRIT

The petitioner asserts that a writ of certiorari should be granted under Subdivision (b) of Part V of Rule 19 of this Court in that the U. S. Court of Appeals for the District of Columbia Circuit has rendered a decision on an important question of federal law relating to government insurance granted under the National Service Life Insurance Act in conflict with the decision on a like question of law by the U. S. Court of Appeals for the 9th Circuit and also the U. S. Court of Appeals for the 7th Circuit to which reference will be made hereinafter.

The question involved is simply one whether the Veterans Administration who is the agent of the government for the reinstatement of National Service Life Insurance

is to be charged with notice of its own files. It is undisputed that the medical reports which the United States says were not disclosed to the Veterans Administration were all contained in the files in the Veterans Administration. There is no evidence of fraud on the part of the applicant for reinstatement other than that it is claimed that he should have set out the dates of examinations by the medical staff of the Veterans Administration when he applied for the reinstatement of the policy in question. The petitioner claims that the insured, by stating that he had applied for compensation and giving his claim number which was his true number in the Veterans Administration where all the medical reports were contained therein, put the Veterans Administration on notice as to those medical reports. No clearer statement could have been made as to where the medical reports were contained than the information given by the insured, George N. Herbert, on the application for reinstatement. The claim number itself is proof that he applied for compensation and that he was probably receiving compensation for his disabilities. He did not have to be a first class medical risk in order to obtain reinstatement of his insurance for the reason that he made his application for reinstatement before January 1, 1950 and he was suffering from service-incurred disabilities.

The Insurance Division of the Veterans Administration is not a separable division. It was created when the Veterans Bureau was established on August 8, 1921. There has been close coordination between the various units of the Veterans Bureau and later on July 3, 1930 when the name was changed to the Veterans Administration. At the outset reinstatement of insurance under the War Risk Insurance Act and the World War Veterans Act of June 7, 1924, government insurance cases were handled for a long period of time by the same rating boards. No establishment of a separate board for insurance cases was

made until sometime during the year 1925. Prior to that time ratings for permanent and total disabilities for both compensation and insurance were made by the same rating board. The insurance that was issued under the War Risk Insurance Act and the World War Veterans Act matured by reason of permanent and total disabilities. In a long considered practice and custom of the Veterans Administration, whenever an application for reinstatement of insurance showed upon its face that the applicant had applied for compensation and gave his claim number such as the insured did in this case, resort as a matter of common practice was made to the compensation folder and the medical reports therein were always reviewed. This was the practice and custom of the Veterans Administration when this insurance was reinstated on the application dated April 26, 1948. This practice was continued at least until October 26, 1948. Printed at length herein is a letter of O. W. Clark, Executive Assistant Administrator, dated Oct. 26, 1948 stopping the practice in question and refusing to apply opinions of the Solicitor of the Veterans Administration dated April 28, 1948 and March 24, 1948 which is as follows:

Mr. B. C. Moore
Deputy Administrator
Veterans Administration Branch Office No. 9,
420 Locust Street
St. Louis, 2, Missouri.

Dear Mr. Moore:

Reference is made to opinions rendered in the cases of Frank F. Short, C-7,488,629, N-3,291,355, and John Frank Vondrak, FN-3,725,123, N-12,192,524, in which it was held that the Veterans Administration is estopped from contesting insurance for fraud where, subsequent to processing the application for insurance it is discovered that the applicant misrepresented the facts regarding his health,

but furnished C-number for his disability claim and the claim folder reflected the true facts of his health at the time the application for insurance was submitted.

This question of policy has received further consideration and the Administrator has determined that the foregoing opinions will not be considered as precedents for general application.

In handling fraud cases in the future where the applicant in his application for insurance or for reinstatement thereof made a false statement of a material fact regarding his health with knowledge of its falsity and with intent to deceive, and the Veterans Administration, without referring to the claim folder, relied upon such statement in granting the insurance, necessary action to cancel the insurance will be taken immediately upon discovery of the fraud.

Sincerely yours,

Signed and Dispatched 10/26/48
O. W. CLARK
Executive Assistant Administrator

9/FMG:gmb

The opinions referred to in the letter of O. W. Clark, Executive Assistant Administrator, are as follows:

C O P Y — rh #240-48
Assistant Administrator for Insurance
The Solicitor 9DBA/IM:CHM/ck:vos
FN-3,725,123 2BJ/FM:hv
N-12,192,524

VONDRAK, John Frank Mar 24, 1948

1. This is in response to your memorandum reading as follows:

"1. Your opinion is requested as to whether the Veterans Administration is estopped from holding that

this veteran procured reinstatement of $2,000 National Service Life Insurance on July 1, 1947, by fraud. The facts are as follows:

"2. The veteran entered active military service on July 13, 1942, and was honorably discharged January 12, 1946. He applied for and was granted $5,000 National Service Level Premium Term Insurance, effective date July 22, 1942. On June 8, 1943, he applied for and was granted an additional $5,000 National Service Level Premium Term Insurance, effective date June 8, 1943. Premiums on both policies were regularly paid while the veteran was in service. Policy N-3 725 123, which was effective July 22, 1942, lapsed because of non-payment of premiums on March 8, 1946. Policy N-12 192 524, granted effective June 8, 1943, lapsed for non-payment of premiums on March 22, 1946.

"3. On November 18, 1946, using Insurance Form 353a, Mr. Vondrak applied for reinstatement of $2,000 National Service Level Premium Term Insurance under policy N-12 192 524. In answer to the question 'Have you been ill, or suffered or contracted any disease, injury or infirmity, or been prevented by reason of ill health from attending your usual occupation, or consulted a physician, surgeon, or other practitioner for medical advice or treatment at home, hospital, or elsewhere, in regard to your health, since lapse of this insurance?' the veteran answered, 'Yes,' and further stated that he had been hospitalized at the Veterans Administration Hospital at Brecksville, Ohio, for treatment of pulmonary tuberculosis. On the basis of this statement, and further investigation, this reinstatement application was disapproved by our Insurance Medical Division.

"4. On July 1, 1947, the insured submitted a second application for reinstatement of $2,000 National Service "Level Premium Term Insurance. On this application, the question 'Are you now in as good health as you were on the due date of the first premium in default?' was answered, 'Yes' and the question 'Have you been ill, or suffered or contracted any disease, injury or infirmity, or been prevented by reason of

ill health from attending your usual occupation, or consulted a physician, surgeon, or other practitioner for medical advice or treatment at home, hospital, or elsewhere, in regard to your health, since lapse of this insurance?' was answered 'No'. VA Manual M9-3, Part II, Accounts Procedures, does not require the drawing of the insurance folder in the processing of reinstatement applications. The Premium Review Clerk, therefore, was not aware of the action previously taken by the Insurance Medical Division on the earlier application and approved the application dated July 1, 1947.

"5. On August 26, 1947, Mr. Vondrak applied for conversion of the $2,000 Level Premium Term Insurance to 20-Payment Life, effective August 8, 1947. When the insurance folder was reviewed for the conversion, it was noted that the application dated July 1, 1947, did not disclose treatment for tuberculosis which Mr. Vondrak had received during the period of lapse. The evidence of record in the insurance folder reveals that the insured was admitted to the Veterans Administration Hospital at Brecksville, Ohio, on September 25, 1946, with an entrance diagnosis of tuberculosis, pulmonary, moderately advanced, active. The final discharge summary dated May 27, 1947, states: 'Classification on discharge—quiescent'. Mr. Vondrak was discharged on May 26, 1947, a short time prior to his July 1, 1947, reinstatement application.

"6. In order to cope with the tremendous number of applications for new or additional insurance, total disability income provision, reinstatement, conversion, or change in plan which require the most immediate attention that is possible to give, the Office of Insurance has found it expedient to establish a procedure whereby applications for reinstatement for National Service Life Insurance on VA Form 9-353a are processed by Premium Review clerks without referral to the Insurance Medical Division or reference to the insurance folder provided that the applicant answers 'Yes' to the question 'Are you now in as good health as you were on the due date of the first premium in default'; 'No' to the question 'Have you been ill, or

suffered or contracted any disease, injury or infirmity, or been prevented by reason thereof from attending your usual occupation, or consulted a physician, surgeon, or other practitioner for medical advice or treatment at home, hospital, or elsewhere, in regard to your health, since lapse of this insurance?'; and answers the question as to application for disability compensation, etc. To take the time necessary to attach and consider all pertinent records in connection with such applications would defeat the purpose of the procedure and greatly delay the handling of this and all other types of applications for reinstatement, conversion, etc.

"7. The question presented is: When an application for reinstatement has been processed in this manner and approved and it is subsequently established that the veteran misrepresented the condition of his health by making untruthful answers to the pertinent questions is the Veterans Administration estopped from holding that the reinstatement was procured by fraud because the true facts were of record in the insurance folder?"

2. On November 18, 1946, the insured made an application for the reinstatement of $2000 lapsed National Service Life Insurance (Form 353a) and for the conversion thereof (Form 358) to a 20-payment life policy. In the application for reinstatement he stated that he was not in as good health as he was on the date of the first premium in default, and that he had been hospitalized at the VA Hospital, Brecksville, Ohio, for treatment of pulmonary tuberculosis. The application for reinstatement, after consultation of the claim file, was rejected on February 26, 1947.

3. The insured was discharged from the VA Hospital on May 26, 1947 when his condition was classified as quiescent and as having received the maximum hospital benefit.

4. On July 1, 1947, the insured reapplied for reinstatement of $2000 lapsed National Service Life Insurance. In this supplemental application he stated that he was in as good health as he was on the date of the first premium in default. (This statement is a matter of opinion as to which no fraudulent intent may be imputed). To the question whether he had been ill or suffered or contracted any disease, injury, or infirmity or have been prevented by reason thereof from attending his usual occupation, or consulted a physician, surgeon, or other practitioner for medical advice or treatment at home, hospital, or elsewhere, in regard to his health since the lapse of his insurance, he answered, "No".

5. On the application there was another question which the Government considered material, that is to say, as to whether he had applied for disability compensation. To this question he answered, "Yes" and gave his correct claim number, C-5,808,588.

6. It is also to be observed that the application for reinstatement dated July 1, 1947, carried on it the identifying numbers of his National Service Life Insurance.

7. In United States v. Kelley, 136 F. 2d 823, on the question whether there was fraud in connection with an application for insurance, the court held that where there were identifying numbers on the application disclosing the availability of information as to the state of health of the applicant there was no fraud even though the statements made by the applicant were untrue.

8. The VA is presumed to have knowledge of the insurance records of the applicant. And where it seeks information as to whether the applicant had applied for disability compensation and received an affirmative answer and was furnished with the correct claim number, as a matter of law, the VA is presumed to have knowledge of the contents of the disability claim file as to the state of health of the applicant.

9. The court pointed out in United States v. Kelley, supra, that:

> "There is here no question of imputing to the Veterans' Administration knowledge which it might have been able to obtain from the records of another Department of the Government. Kelley's application for compensation was a part of the Administration's own records. Its knowledge thereof was actual, not imputed, knowledge. Hence such cases as United States v. Riggins, 9 Cir., 65 F.2d 750; United States v. Depew, 10 Cir., 100 F. 2d 725; and Jones v. United States, 5 Cir., 106 F. 2d 888, cited by appellant, have no relevancy here."

10. For its own convenience, the VA on July 10, 1947, issued TB-9-35 in Paragraph 9 of which the pertinent part reads:

> "In any case where 'Application for Reinstatement' (nonmedical) (VA Form 9-353a) is received and the applicant answered 'Yes' to the question, 'Are you now in as good health as you were on the due date of the first premium in default?' and 'No' to the question, 'Have you been ill, or suffered or contracted any disease, injury, or infirmity, or been prevented by reason thereof from attending your usual occupation, or consulted a physician, surgeon, or other practioner for medical advice or treatment at home, hospital, or elsewhere in regard to your health, since lapse of this insurance?' and it is indicated in the application that he has applied for disability compenstation, retirement pay, pension, or waiver of premiums, or has otherwise been assigned a C-number, it will not be necessary to requisition the Claims folder. Such applications will be forwarded to the Accounts Unit, Underwriting and Insurance Accounts Division, and if all other requirements incident to the reinstatement are met, the application will be approved by the premium review clerk in accordance with existing procedure."

11. It is apparent from the submission that it was not the practice to consult the insurance file and even though

the applicant stated he had applied for compensation or pension to ignore such fact.

12. The application was approved. On August 26, 1947, the insured applied for the conversion of the $2000 reinstated Level Premium Term Insurance to a policy of 20-payment life. The application for conversion was processed and No. V-6,058,098 was assigned. However, during the processing it was noted for the first time that the answers on the second application were at variance with the answers on the first application for reinstatement and the question was raised whether the second application for reinstatement should have been approved.

13. The reinstatement is incontestable under the provisions of Section 602 (w) except, among other grounds, for fraud. Therefore, in the consideration of a case to determine whether there is fraud in connection with an application for insurance or for the reinstatement of lapsed insurance the truth or falsity of statements made by the applicant is a question of fact, but where the facts are determined it is then a question of law whether the determined facts constitute fraud.

14. It is now well settled that in order to constitute a defense of fraud in an insurance contract these elements must be present; (1) A false representation, (2) in reference to a material fact, (3) made with knowledge of its falsity, (4) and with the intent to deceive and be acted upon, (5) when action has been taken in reliance upon the representation. Claflin v. Commonwealth Ins. Co., 110 U. S. 81, 28 L. Ed. 76.

15. The facts in this case as to the state of health of the insured were known to the VA. They were revealed in the prior application for reinstatement contained in the insurance file, and in the disability compensation file of the applicant. As a matter of expediency and for its own convenience the VA elected to disregard and ignore

the information readily available which would have afforded an opportunity to check on the validity of the application in question.

16. On stated facts in this particular case this Office cannot recognize and ground which would afford you a legal basis on which to contest the validity of the application in question.

EDWARD E. ODOM

#317-48

Assistant Administrator for Insurance
The Solicitor
SHORT, Frank F.
C-7 488 629
N-3 291 355

APR 28 1948
2BF/HST/es

1. This is in reply to your memorandum in the above-entitled case reading as follows:

"1. Your opinion is requested as to whether the Veterans Administration is estopped from holding that this veteran procured reinstatement of $10,000 National Service Life Insurance on December 6, 1946, by fraud. The facts are as follows:

"2. The veteran enlisted in the Naval Service on June 23, 1942, and was discharged on points on November 23, 1945. While in service he was granted insurance without physical examination in the amount of $10,000 effective August 1, 1942, evidenced by Certificate No. N 329 13 55. Premiums on this insurance were paid to March 1, 1946, when it lapsed for nonpayment of premiums.

"3. On December 6, 1946, the veteran executed an Application for Reinstatement of $10,000 National Service Life Insurance. On this application, for answer to the question, "Are you now in as good health as you were on the due date of the first premium in default? (Answer 'yes' or 'no')', he stated, 'yes.' For answer to the question, "Have you been ill, or suf-

fered or contracted any disease, injury or infirmity, or been prevented by reason of ill health from attending your usual occupation, or consulted a physician, surgeon, or other practitioner for medical advice or treatment at home, hospital, or elsewhere, in regard to your health, since lapse of this insurance? (Answer 'yes' or 'no')', he stated, 'No'. He did not reply to the instruction, '(If 'yes' give all dates and full particulars, including the name and address of practitioner and attach to this application a certificate of the practitioner or head of the hospital where treated, with diagnosis, prognosis, and treatment if available)'. For answer to the question, "Have you ever applied for disability compensation, retirement pay, or pension? (Answer 'yes' or 'No')', he stated, 'Yes', and stated his claim Number to be C7 488 629. Relying on the truth and accuracy of his replies in his Application for Reinstatement, the $10,000 National Service Life Insurance, evidenced by Certificate No. N 329 13 55, was reinstated on December 6, 1946.

"4. On June 25, 1947, the veteran executed a Statement of Claim for Waiver of Premiums in which, in reply to the question, 'Date continuous total disability caused absence from work or relief from duty'?, he stated, 'December 1, 1946.' For answer to the question, 'Date returned to work or duty,' he stated. 'Have not returned to work.' In reply to the question, 'Disease or injury causing total disability', he stated 'Tuberculosis'. For reply to the question concerning hospitalization, he listed Belmont Sanitarium, RD # 3, St. Clairsville, Ohio; date of admission, December 16, 1945; and date of release, May 14, 1946, (apparently meant 1946 and 1947). For reply to the question concerning physicians from whom treatment was received, he listed Dr. A. V. McCoy, National Bank Building, Elm Grove, West Virginia; date treatment began, November 1945; date of release, November 1945; and Dr. Garrison, Belmont Sanitarium, St. Clairsville, Ohio; date treatment began, December 16, 1945; and date of release May 14, 1946. For answer to the question concerning occupation

since beginning date of total disability, he stated, 'None (Tuberculosis)'.

"5. After consideration of all the evidence of record, on October 9, 1947, the Disability Insurance Claims Division rendered its decision that the veteran has been totally disabled from December 16, 1946, continuing.

"6. An examination of the veteran's case folder discloses that in veteran's Application for Compensation or Pension, Veterans Administration Form 526, dated November 13, 1946, and received by the Veterans Administration November 13, 1946, he stated, in answer to the request for names and addresses of all civilian physicians from whom he had received treatment, 'Dr. Arley McCoy, National Bank, Elm Grove, West Virginia'; Disability, 'Tuberculosis'; Date, 'October, 1946'. The case file also discloses that on November 16, 1946, the veteran was examined on behalf of the Veterans Administration by Dr. Arley V. McCoy and diagnosis of incipient pulmonary tuberculosis was made. The doctor certified that the veteran did need hospitalization and would accept it. For history of disease, it was stated, 'Patient states he has been losing weight steadily for past 6-8 months—has had a persistent cought for the past year—night sweats past 2 months—has been feeling weak and tired ever since discharge from service.' This report is stamped 'Received' by the Veterans Administration, Wheeling, West Virginia, on November 19, 1946.

"7. The veteran is shown to have been admitted for treatment at Belmont Sanitarium, St. Clairsville, Ohio, on December 16, 1946. In answer to inquiry from this office for a brief report stating the date on which he first treated the veteran, the period of treatment, diagnosis and prognosis, and whether or not the veteran was apprised of his condition, Dr. McCoy by letter dated October 25, 1947, stated 'I first saw Mr. Frank Farley Shorts on October 8, 1946. He gave a history of having had fever, chills and sweats for approximately two weeks preceding this

visit. I found an area of small subcrepitant rales over the upper right lobe; more marked anteriorly. I continued treating him until November 16, 1946, at which time papers were filled out so that he might be cared for by the Veterans Administration. My diagnosis of tuberculosis was confirmed by x-ray on October 24 at the Ohio Valley General Hospital. The x-ray showed infiltration in the upper right lung field, and a swollen lymph node in the right hilus. Mr. Short was apprised of his condition at that time. He was hospitalized by the Veterans Administration. I would consider the prognosis good providing he is able to care for himself as prescribed.'

"8. In a memorandum to the Disability Insurance Claims Division from the Insurance Medical Division dated December 10, 1947, it is stated, 'Had these facts been available on January 16, 1947, the date the application was approved, it is the opinion of this division that such favorable action would not have been taken.'

"9. In order to cope with the tremendous number of applications for new or additional insurance, total disability provision, reinstatement, conversion or change in plan, it was necessary to revise the existing procedures to the end that such applications would receive immediate consideration. The procedure adopted authorized approval of applications for reinstatement submitted on VA Form 353a without referral to the Insurance Medical Division and without reference to the insurance or claims folder if the applicant answers 'Yes' to the question 'Are you now in as good health as you were on the due date of the first premium in default?'; 'No' to the question 'Have you been ill or suffered or contracted any disease, injury or infirmity, or been prevented by reason thereof from attending your usual occupation or consulted a physician, surgeon, or other practitioner for medical advice or treatment at home, hospital, or elsewhere in regard to your health since lapse of this insurance?' and also answers the question as to application for disability compensation, etc. As you know the claims folders are not located in the office

handling applications for reinstatement and in a very practical sense such folders have not been available to the Insurance Service. It would have been virtually impossible to secure these folders and make progress in disposing of vast numbers of applications with that degree of promptitude necessary to satisfy the applicants. Since the procedure adopted is primarily in the interest of the individuals, it is felt that the extent of their responsibility for representing the true facts is to be appraised in the light of circumstances compelling a fuller reliance upon such representations.

"10. In the present case, the evidence cited in paragraph 6, supra, was of record in the applicant's claims folder. As it was located in the Pittsburgh, Pennsylvania, Regional Office, it was not immediately available to the Richmond Branch, and that office had no knowledge that the folder contained information pertinent to the application for reinstatement. In order to have consulted it, the Insurance Service would have had to secure the transfer of the claims folder from Pittsburgh to Richmond. Such transfer would either have interrupted action on the veteran's claim for pension or would have had to be deferred until such action had been completed.

"11. The question presented is: When an application for reinstatement of insurance has been processed in this manner and approved and it is subsequently established that the veteran misrepresented the condition of his health by making untruthful answers to the pertinent question, is the Veterans Administration estopped from holding that the reinstatement was procured by fraud?

"12. In this connection your attention is invited to submission dated December 19, 1947, in the case of John Frank Vondrak, FN-3 725 12, N-12 192 524."

2. In a recent opinion rendered by this Office under date of March 24, 1948, in the case of John Frank Vondrak, FN-3 725 123, N-12 192 524, in which the facts were somewhat similar to those in this case it was stated in part:

"In United States v. Kelley, 136 F. 2d 823, on the question whether there was fraud in connection with an application for insurance, the court held that where there were identifying numbers on the application disclosing the availability of information as to the state of health of the applicant there was no fraud even though the statements made by the applicant were untrue.

"And where it (the VA) seeks information as to whether the applicant had applied for disability compensation and received an affirmative answer and was furnished with the correct claim number, as a matter of law, the VA is presumed to have knowledge of the contents of the disability claim file as to the state of health of the applicant.

"The court pointed out in United States v. Kelley, supra, that:

> 'There is here no question of imputing to the Veterans' Administration knowledge which it might have been able to obtain from the records of another Department of the Government. Kelley's application for compensation was a part of the Administration's own records. Its knowledge thereof was actual, not imputed, knowledge. Hence such cases as United States v. Riggins, 9 Cir., 65 F. 2d 750; United States v. Depew, 10 Cir., 100 F. 2d 725; and Jones v. United States, 5 Cir., 106 F. 2d 888, cited by appellant, have no relevancy here.'

"For its own convenience, the VA on July 10, 1947, issued TB-9-35 in Paragraph 9 of which the pertinent part reads:

> 'In any case where 'Application for Reinstatement' (non-medical) (VA Form 9-353a) is received and the applicant answered 'Yes' to the question, 'Are you now in as good health as you were on the due date of the first premium in default?' and 'No' to the question, 'Have you been ill, or suffered or contracted any disease, injury, or infirmity, or been prevented by reason thereof

from attending your usual occupation, or consulted a physician, surgeon, or other practitioner for medical advice or treatment at home, hospital, or elsewhere in regard to your health, since lapse of this insurance?' and it is indicated in the application that he has applied for disability compensation, retirement pay, pension, or waiver of premiums, or had otherwise been assigned a C-number, it will not be necessary to requisition the Claims folder. Such applications will be forwarded to the Accounts Unit, Underwriting and Insurance Accounts Division, and if all other requirements incident to the reinstatement are met, the application will be approved by the premium review clerk in accordance with existing procedure.'

* * *

"The reinstatement is incontestable under the provisions of Section 602 (w) except, among other grounds, for fraud. Therefore, in the consideration of a case to determine whether there is fraud in connection with an application for insurance or for the reinstatement of lapsed insurance the truth or falsity of statements made by the applicant is a question of fact, but where the facts are determined it is then a question of law whether the determined facts constitute fraud.

"It is now well settled that in order to constitute a defense of fraud in an insurance contract these elements must be present; (1) A false representation, (2) in reference to a material fact, (3) made with knowledge of its falsity, (4) and with the intent to deceive and be acted upon, (5) when action has been taken in reliance upon the representation. Claflin v. Commonwealth Ins. Co., 110 U. S. 81, 28 L. Ed. 76. "The facts in this case as to the state of health of the insured were known to the VA. They were revealed in the prior application for reinstatement contained in the insurance file, and in the disability compensation file of the applicant. As a matter of expediency and for its own convenience the VA elected to disregard and ignore the information readily avail-

able which would have afforded an opportunity to check on the validity of the application in question. "On stated facts in this particular case this Office cannot recognize any ground which would afford you a legal basis on which to contest the validity of the application in question."

3. The reasons stated in your submission for the adoption of the procedure of passing upon applications for reinstatements of National Service Life Insurance without reference to the insurance or claims folder, under the circumstances set forth by you, in cases in which the veteran states that he has applied for disability compensation or pension and even gives his claims number, do not in the judgment of this Office constitute sufficient legal basis for relieving the VA of examining such files and being charged with knowledge of information contained therein bearing on the question as to whether the applicant's health is such as to make him eligible for the particular reinstatement of insurance which is then being considered. In other words, it is believed that the factors which prompted the adoption of the procedure referred to by you do not justify a legal basis for distinguishing this case from that of United States v. Kelley, supra, and that the Court's statement in that case to the effect that the knowledge of the Veterans Administration of information contained in the claims folder was actual, not imputed, knowledge, is applicable to this case.

4. It is, therefore, the opinion of this Office that on the facts in this particular case there is no ground which would afford the Government a legal basis for contesting the validity of the application for reinstatement.

EDWARD E. ODOM

The opinion of the Solicitor of the Veterans Administration, holding that fraud could not be predicated on the facts in cases similar to that of the petitioner, was based

upon a decision of the U. S. Court of Appeals for the 9th Circuit *U. S.* v. *Kelly,* 136 F. 2d 823, which decision is directly contrary to the decision of the U. S. Court of Appeals for the District of Columbia Circuit in the petitioner's case. The decision also of the U. S. Court of Appeals for the 7th Circuit in the case of *Clohesy* v. *United States,* 199 Fed. 2d 475, also conflicts with the decision of the U. S. Court of Appeals for the District of Columbia Circuit in this case. In the Clohesy case the court said as follows:

> "There it was shown that all applications by veterans for compensation were identified by a 'C' number and that the veteran's application for insurance in that case, at the time it was approved by the Insurance Section, bore his 'C' number, thus showing to the person or persons passing on the application that the veteran had then made an application for Government compensation. On the particular facts of that case we agree that there the knowledge, not only of the Veterans Administration but of the Insurance Section of the department, could be properly said to be 'actual, not imputed'. Under those circumstances we think the court properly held that the Government could not claim that fraud of the insured caused the approval of the insurance application."

The court below also overruled the opinion of Judge Youngdahl in the case of *Thompson* v. *United States,* 109 Fed Supp. 283, who followed the opinion of the 9th Circuit in the case of *U. S.* v. *Kelly, supra.*

The opinion of the court below in the petitioner's case totally ignores the reasons why the questions were on the application for reinstatement relative to whether the applicant had applied for compensation, and if so, giving his claim number in the Veterans Administration were asked. What was the purpose of these two questions on the application for reinstatement if it was not to advise the Veterans Administration that the applicant had filed

a claim and that by giving his correct claim number his file would be available to the officials of the Veterans Administration who reinstated his policy? The court below decided this case as if the two questions had not appeared on the application at all. In other words, in accordance with their opinion, the answers to such questions were of no importance whatsoever.

Counsel for the petitioner has been advised that the form now used for reinstatement of lapsed National Service Life Insurance does not contain the two questions answered by the insured in this case. Obviously this is so that the Veterans Administration cannot be said to be put on notice of their own records and files. As far as the separation of the Insurance Division of the Veterans Administration and the other divisions handling compensation or other matters under the jurisdiction of the Veterans Administration, their offices are no more segregated than the offices of the Justices of this Court. It has been common practice for years to consult compensation folders where application for reinstatement of insurance was made particularly where the application shows upon its face that the applicant had filed a claim for compensation. In fact, as stated above, this was the very reason why the questions as to compensation were asked in the application for reinstatement. Counsel for the petitioner was engaged as government counsel for thirteen years covering the period from the years 1923 to 1936 in the trial and preparation for trial of government insurance cases. He became familiar not only with the files but with the method, procedure and custom of handling insurance cases by the Veterans Administration. No Judge of the United States has had any more experience in government insurance cases than District Judge Holtzoff who sustained the petitioner's motion for a summary judgment in this case. For many years prior to his appointment on the bench, Judge Holtzoff reviewed hun-

dreds of insurance cases as an attorney in the Department of Justice to determine whether or not appeals should be taken from the judgments. No Judge of the United States is more familiar with the practice, procedure and custom of the Veterans Administration than Judge Holtzoff, and for that reason his opinion in this case should be entitled to the greatest respect and certainly more respect than that of the Judges who have very little experience with government insurance cases.

The Veterans Administration has always more or less been operated like an insurance company. Many of its officials were formerly officials of insurance companies. They have taken and accepted risks like in the year 1920 when they had hundreds of thousands of dollars worth of premiums held in suspension for reason of failure of reinstatement requirements and a blanket approval was given to all such applications knowing that some of the claims would be payable but because it was good insurance business to do so. In the last World War II they even refused to grant insurance to soldiers on the fighting front in some instances even though those men were performing their regular Army duties. I desire only to call this matter to the court's attention for the reason that since the Veterans Administration has operated in most instances like an insurance company, the liabiilties as far as insurance granted should be similar to the liabilities of the ordinary commercial companies.

Since the decision of the court below in the petitioner's case clearly conflicts with the decision of the U. S. Court of Appeals for the 9th Circuit and the decision of the U. S. Court of Appeals for the 7th Circuit, the grounds for issuance of the writ in this case are clear and the writ of certiorari should be granted.

CONCLUSION

WHEREFORE, the petitioner prays that a writ of certiorari may issue under the seal of this Honorable Court in this cause directed to the United States Court of Appeals for the District of Columbia Circuit and that upon such review that judgment of the said U. S. Court of Appeals be vacated, reversed and set aside and the judgment of the United States District Court for the District of Columbia be affirmed and this cause remanded to the said United States Court of Appeals to issue a mandate in accordance with the opinion of this court.

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Washington 5, D. C.
Attorney for the Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12475

UNITED STATES OF AMERICA, APPELLANT

v.

HELEN M. KIEFER, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided August 18, 1955

Mr. Robert S. Green, Attorney, Department of Justice, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court, with whom *Mr. Leo A. Rover*, United States Attorney, was on the brief, for appellant. *Messrs. Samuel D. Slade* and *Julian H. Singman*, Attorneys, Department of Justice, and *Mr. Lewis Carroll*, Assistant United States Attorney, also entered appearances for appellant.

Mr. Claude L. Dawson for appellee.

Before BAZELON, WASHINGTON and DANAHER, Circuit Judges.

BAZELON, *Circuit Judge*: Appellee sued, as sole beneficiary, for benefits under her deceased brother's National Service Life Insurance policy. The District Court rejected the Government's affirmative defense of fraud and entered summary judgment for appellee.[1] The Govern-

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[1] Fraud in procuring reinstatement is a statutory ground

ment appeals.

The essential elements of fraud are "(1) a false representation (2) in reference to a material fact (3) made with knowledge of its falsity (4) and with intent to deceive (5) with action taken in reliance upon the representation."[2] These elements, the Government asserts, are established by the fact that the insured's policy had been reinstated upon an application which falsely represented, in answers to questions numbered 8 and 9, that he was in as good health at the time of the application as he was on the due date of the first premium in default.[3]

In answer to question number 10, however, the insured disclosed the existence and "C" number of his Veterans Administration claim file containing information from

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for contesting a policy issued under the National Service Life Insurance Act, 60 STAT. 787 (1946), 38 U.S.C. § 802(w) (1952).

[2] Pence v. United States, 316 U.S. 332, 338 (1942).

[3] Questions 8 and 9 and the insured's answers were as follows:

> "8. Are you now in as good health as you were on the due date of the first premium in default? [x] Yes. [ ] No.
>
> "9. Have you been ill, or suffered or contracted any disease, injury, or infirmity, or been prevented by reason thereof from attending your usual occupation, or consulted a physician, surgeon, or other practitioner for medical advice or treatment at home, hospital, or elsewhere, in regard to your health, since lapse of this insurance? [ ] Yes [x] No. (If 'yes,' give all dates and full particulars below.)"

By regulation, reinstatement of lapsed insurance may be made on a comparative health basis. 38 C.F.R. § 10.3423 (Supp. 1946), as amended, 12 FED.REG. 7116 (1947), 13 FED.REG. 181 (1948); 38 C.F.R. § 10.3424 (Supp. 1946), as amended, 13 FED.REG. 657 (1948).

which the truth was determinable.[4] According to that file, the insured was discharged from the Army in 1945 on a certificate of disability for chronic bronchial asthma. This condition resulted in a 1945 Veterans Administration grant of disability compensation for which a claim number was assigned. Prior to lapse of the policy in September 1947, the insured, on two occasions, was examined and treated at the Veterans Administration hospital for bronchial asthma. After the lapse, according to the claim file, he was hospitalized twice under the auspices of the Veterans Administration. The diagnosis on the first occasion was asthma, mild hypertension and nephritis. In March and April 1948, during the second hospitalization lasting nearly a month, his condition was diagnosed as cirrohsis of the liver. The examining doctor observed that the patient had been "drinking steadily for six months about a quart a day. His liver is down to its iliac crest. He has been nauseated and vomiting for some time. No food for 36 hours." This observation was made immediately prior to the reinstatement application in April 1948.

The District Court ruled that disclosure of the claim file number precluded the Government, as a matter of law, from claiming reliance upon the false representations —and thus barred the defense of fraud.[5] We think this

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[4] Question 10 and insured's answer read as follows:

"10. Have you ever applied for disability compensation, retirement pay, pension or waiver of insurance premiums? [x] Yes [ ] No. (If 'yes,' give Claim No. below.) C-No. 5 241 066."

[5] The court observed that the "government may not close its eyes to what it can find by reference to its own files," and purported to follow a decision of another of its branches and decisions of the Courts of Appeals for the Seventh and Ninth Circuits. Thompson v. United States, 109 F.Supp. 283 (D.D.C. 1952), *affirmed*, 93 U.S.App.D.C. 231, 210 F.2d 724

ruling is erroneous. The view implicit therein is that the Veterans Administration insurance service had notice, either actual or constructive, of the information in the insured's claim file when it allowed his application for reinstatement. But there is no evidence of actual notice,[6] and we hold the Government may not be charged with constructive notice in the circumstances of this case.[7]

Where no claim number is disclosed on a reinstatement application, it has been held that "knowledge of what is contained in the files of [other Veterans Administration services] is not imputable to the insurance service which passes upon application for reinstatement."[8]

(1953); Clohesy v. United States, 199 F.2d 475 (7th Cir. 1952), discussed *infra*, note 8; United States v. Kelley, 136 F.2d 823 (9th Cir. 1943).

[6] The record does not reflect, for example, that those who passed on the application requisitioned and looked into the claim file.

[7] The insured filed his reinstatement application in April 1948 and paid premiums until his death in November 1951, a period of about only three and a half years. We do not decide whether equitable principles would preclude our present holding in a case where the insured had paid premiums for a great number of years after the filing and approval of his reinstatement application. In such a case it might also be argued that the Government suffered little or no detriment.

[8] United States v. Cooper, 200 F.2d 954, 956 (6th Cir. 1953). Similarly, knowledge of falsity coming into possession of the compensation section subsequent to reinstatement is not imputed to the insurance section so as to estop the Government from asserting fraud. Clohesy v. United States, 199 F.2d 475 (7th Cir. 1952); Halverson v. United States, 121 F.2d 420 (7th Cir. 1941), *cert. denied*, 314 U.S. 695 (1941). In Clohesy, falsity could not have been determined from Veterans Administration files at the time the application was reinstated; it was disclosed subsequent to reinstatement by the insured's application for compensation, and a

We think there are considerations which justify the application of the same rule where the claim number is disclosed.[9]

First, assignment of "C" numbers is not limited to disability claims. They include, *inter alia*, claims for retirement pay, pensions or waiver of premiums.[10] Hence a "C" file does not necessarily contain information material in determining the insured's eligibility for reinstatement on the basis of his comparative health.[11]

Second, in the interest of efficient administration of its vast operations, the Veterans Administration insurance and compensation services maintain their respective files separately.[12] And to expedite its great volume of business,[13] the insurance service, pursuant to regulation, reinstates insurance without requisitioning the "C" file where the insured affirms that his health is no worse than it was

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later letter in which his claim number was cited. The Court held that continuation of the policy by the insurance section, in the face of the "true facts" which later came into possession of the compensation section, did not vitiate the original fraud.

[9] See McDaniel v. United States, 196 F.2d 291 (5th Cir. 1952).

[10] See note 4, *supra*.

[11] Even if the file related only to a disability claim, such a claim would not necessarily bar reinstatement, *e.g.*, where it was based on a disease antedating the lapse which had not worsened. Cf. Jones v. United States, 106 F.2d 888, 891 (5th Cir. 1939).

[12] Clohesy v. United States, 199 F.2d 475, 477 (7th Cir. 1952); Halverson v. United States, 121 F.2d 420, 422 (7th Cir. 1941), *cert. denied*, 314 U.S. 695 (1941).

[13] Between June 1947 and June 1948, 1-3/4 million applications were filed covering a total of ten billion dollars of insurance. Annual Report, Administrator of Veterans' Affairs, H.Doc. 8, 81st Cong., 1st Sess. 66 (1949).

at the time his insurance lapsed.[14] Such reliance on the applicant's representations eliminates unnecessary delay caused by needless examination of claim files that may be unrelated to comparative health.[15] Clearly the procedure under the regulation is reasonably related to efficient administration of the insurance program and is valid.

United States v. *Kelley*[16] is not to the contrary. There the alleged falsity related to the insured's statement, on an original application for insurance, that he had never applied for "government compensation." A Veterans Administration official had endorsed Kelley's "C" number on his application prior to its approval. The jury could reasonably have inferred from this endorsement that, since the official had found the "C" number himself, he must have found it as a result of inspection of the file. On that basis, we agree with the Seventh Circuit in *Clohesy* v. *United States*[17] that, on the particular facts of *Kelley*, the insurance section passing on the application had "actual, not imputed" knowledge that the insured had filed for compensation.

Lastly, our holding that the Government is not precluded from claiming reliance is also supported by equitable considerations. A contrary holding would allow an applicant who supplies false answers, with awareness of their falsity to

> "avoid the consequences of having answered falsely by the claim, that the United States, by consulting

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[14] 38 C.F.R. § 10.3424 (Supp. 1946), as amended, 13 FED. REG. 657 (1948) provides in pertinent part that the "Applicant's own statement of comparative health may be accepted as proof of insurability for the purpose of reinstatement under § 10.3423(a) . . ." And see McDaniel v. United States, 196 F.2d 291, 294, n. 3 (5th Cir. 1952).

[15] See note 11, *supra*.

[16] 136 F.2d 823 (9th Cir. 1943).

[17] 199 F.2d 475, 477 (7th Cir. 1952).

the disability files could have found out that what he put forward as true was in fact false, and therefore, may not complain that it was tricked into reinstating the certificate." [18]

Because the District Court ruled the defense of fraud barred by the lack of reliance, it did not consider whether the false representations were made with knowledge of their falsity and with intent to deceive, other elements of the defense of fraud. In *United States* v. *Thompson*,[19] we were able to decide these matters in our disposition of the appeal since all the facts had been stipulated on cross motions for summary judgment. Thus we were assured not only that the parties had no further evidence to adduce but also that there was no genuine issue as to any material fact. In the present case, however, appellee alone moved for summary judgment, and solely on the issue of reliance. Both parties limited their affidavits to that issue. Until they have had an opportunity to adduce evidence on other essential elements of fraud, we cannot assume that there is no genuine issue of material fact in respect thereto.

Accordingly, we conclude that the District Court erred in its view of the applicable law with respect to the element of reliance. The case is remanded with directions to afford the parties an opportunity to litigate that issue and any other appropriate issues in further proceedings.

So ordered.

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[18] McDaniel v. United States, 196 F.2d at 294. Congress has recently enacted legislation protecting part of the insured's investment in premiums paid toward a policy cancelled for fraud. An amendment to § 602(w) of the National Life Insurance Act provides for a refund to the insured or his beneficiary of premiums "for any period subsequent to two years after the date of such fraud . . ." 68 STAT. 28 (1954).

[19] 93 U.S.App.D.C. 231, 210 F.2d 724 (1953).

Filed Aug 18 1955 Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 12,475 April Term, 1955.

United States of America, Appellant,

v.

Helen M. Kiefer, Appellee.

Appeal from the United States District Court for the District of Columbia.

Before: Bazelon, Washington and Danaher, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said District Court for further proceedings in conformity with the opinion of this Court.
Dated: August 18, 1955.

Per Circuit Judge Bazelon.

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

I, JOSEPH W. STEWART, Clerk of the United States Court of Appeals for the District of Columbia Circuit, hereby certify that the foregoing pages, numbered 1 to 66, both inclusive, constitute a true copy of the joint appendix to the briefs, and of the record and proceedings in the said Court of Appeals, as designated by counsel for appellee, in the case of:

United States of America, Appellant,

v.

Helen M. Kiefer, Appellee

No. 12,475 April Term, 1955, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this ninth day of September, A. D. 1955.

JOSEPH W. STEWART, Clerk,
United States Court of Apepals
for the District of Columbia Circuit.

(SEAL) By /s/ William G. Secrest
Deputy Clerk.